

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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J.L., individually and on : 15-CV-1200-CBA
behalf of and as Parent :
of J.R., a student with a :
disability, :
Plaintiff, : United States Courthouse
: Brooklyn, New York
-against- :
: Wednesday, January 6, 2016
NEW YORK CITY DEPARTMENT : 3:00 p.m.
OF EDUCATION, :
Defendant. :
- - - - -X

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE CAROL BAGLEY AMON
UNITED STATES CHIEF DISTRICT COURT JUDGE

A P P E A R A N C E S:

For the Plaintiffs: Partnership for Children's Rights
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1 (In open court.)

2 THE LAW CLERK: J.L. v. New York City Department of
3 Education, 15-CV-1200, on for oral argument.

4 THE COURT: All right. Would the parties state
5 their appearances, please, first for plaintiff.

6 MR. GRAY: Yes, your Honor. Thomas Gray from
7 Partnership for Children's Rights on behalf of plaintiffs,
8 J.L. and J.R.

9 THE COURT: Okay.

10 MS. MBAYE: Leslie Mbaye of the Office of the
11 Corporation Counsel on behalf of the defendant, Department
12 of Education.

13 THE COURT: All right. Good afternoon.

14 MS. MBAYE: Good afternoon, your Honor.

15 THE COURT: Mr. Gray, do you want to be heard
16 first?

17 MR. GRAY: Yes. That's fine. Thank you.

18 May I approach?

19 THE COURT: Yes, sure.

20 MR. GRAY: Your Honor, plaintiffs' primary
21 contention in this case or primary argument is a sufficiency
22 argument. The DOE had a burden to present evidence and the
23 DOE didn't meet that burden.

24 THE COURT: In terms of the recommendation over
25 the placement of the classroom size.

1 MR. GRAY: That's right. The parents' primary
2 allegation at the impartial hearing is that the 12:1:1 class
3 placement --

4 THE COURT: Was too large and not sufficient.

5 MR. GRAY: Yes, that's right. And that's the
6 allegation -- that's the primary allegation. Under New York
7 state law, it's the DOE's burden, it's the school district's
8 burden, to present evidence to show that the child is being
9 provided an appropriate education. In this case, the DOE
10 just didn't present evidence. It's the meat of our
11 contention before your Honor.

12 THE COURT: Didn't present evidence at which --

13 MR. GRAY: Didn't present evidence before the IHO.
14 They presented three documents. I'm sorry. They didn't
15 present evidence to meet their burden, I should say.

16 THE COURT: Okay.

17 MR. GRAY: They presented three documents. They
18 presented the IEP itself, the educational program itself,
19 the recommendation itself. They presented a notice of
20 placement, basically placing the child at a particular
21 public school. And they presented mailing notices. They
22 didn't present any documents --

23 THE COURT: Any testimony?

24 MR. GRAY: They didn't present any testimony, it's
25 our position. And I think if your Honor reviews the

1 transcript, the person from the DOE who was testifying at
2 the hearing, Ms. Piccola, doesn't present any testimony that
3 the 12:1:1 recommendation is actually appropriate for this
4 particular child, to meet this child's unique needs.

5 You know, the sufficiency argument was made at the
6 impartial hearing and made before the SRO. The SRO, you
7 know, overruled or reversed the IHO's ruling. The IHO in
8 this case found that the DOE didn't meet its burden to show
9 that it provided the child with a FAPE. And the SRO's
10 reasoning is rather irrelevant to the primary contention of
11 the parents.

12 THE COURT: In what way?

13 MR. GRAY: Well, you know, if you go through the
14 reasons as I outlined in my initial brief -- our initial
15 brief -- you know, first of all, the SRO obviously doesn't
16 cite any documentary evidence or testimonial evidence that
17 directly supports the program. You know, the SRO cites to
18 the functional levels, basically, the grade level at which
19 the child is performing math and reading.

20 Now, the level at which the child is performing
21 math or reading isn't directly relevant to whether that
22 child can actually learn and progress in a classroom with 12
23 children and one teacher. The SRO also says, well, the DOE
24 considered placing this child in an ICT classroom, which is
25 an integrated co-teaching classroom. And that classroom is

1 a 30-student classroom -- can be up to 30 students.

2 So, you know, the fact that the DOE considered
3 placing the child in a larger classroom isn't relevant to
4 the parents' contention at this stage that the child needed
5 a smaller classroom than a 12-student classroom.

6 THE COURT: Where is the support or evidence for
7 the fact that this 12 -- I know what you're talking about
8 about burdens, but this 12-person classroom is too large?
9 What would have put the drafters of the IEP on notice of
10 that fact?

11 MR. GRAY: That's right. Well, the parent and
12 Ms. Carfagna, I believe is how you pronounce her last name,
13 who is the teacher from Mary McDowell Friends, the private
14 school in this case where the child is attending the school
15 year prior, the 2011-2012 school year, they were at the IEP
16 meeting. Ms. Piccola's testimony, I believe it's on page 23
17 of the transcript, is that they objected to the 12:1:1
18 program as being too large for the child.

19 So the educator who is teaching the child says
20 that's too large a program for him. The fact that the child
21 was in a classroom the prior school year with 11 students, I
22 believe, and two teachers, so basically double --

23 THE COURT: So the prior placement was a smaller
24 placement than what was even being recommended. My
25 understanding is that the earlier placement was 11 students

1 and 2 teachers?

2 MR. GRAY: That's right.

3 THE COURT: What was being proposed was 12
4 students, a teacher and a paraprofessional?

5 MR. GRAY: That's right.

6 THE COURT: And then the teacher at the meeting
7 was saying that even this 11 people with two teachers was
8 too large?

9 MR. GRAY: Well, right. The evidence that comes
10 out at the hearing, right, is that the child is struggling
11 in this classroom with 11 students and 2 teachers and is
12 having a lot of trouble progressing and, in fact, was going
13 to be counseled out, I assume removed, from the school.

14 But before removing the child from the school --

15 THE COURT: What does "counseled out" mean?

16 MR. GRAY: I'm assuming that means removed.
17 That's the term.

18 THE COURT: Because the school can't provide that
19 level?

20 MR. GRAY: That's right. From Mary McDowell, Beth
21 Schneider, who I think is the president or one of the high
22 administrators at the school, it came out a little bit at
23 the hearing through the parent as well. But instead of
24 counseling the child out or removing the child from the
25 school, they put the child in a smaller classroom called the

1 Whittier room.

2 THE COURT: That's where the child spent the
3 fourth year that you're seeking reimbursement for?

4 MR. GRAY: That's right. The child was able to
5 make good progress in that very small environment where he
6 could get --

7 THE COURT: The tuition was \$71,000?

8 MR. GRAY: Thereabouts, yes.

9 THE COURT: Now, does the city pay that full
10 tuition? Is that what they are required to do under this
11 program, they would have to pay the 71,000? Or if the city
12 is -- if it's determined that the city is the one picking up
13 the bill, do these schools give some leeway to the city or
14 is the fee reduced? How does that work?

15 MR. GRAY: Generally, in cases that have reached
16 this stage for sure, generally the city pays -- if the city
17 can't prove that they have provided the child with an
18 appropriate education, they are liable for the tuition.

19 THE COURT: No matter what the school wants to
20 charge?

21 MR. GRAY: That's right, that's right. That's the
22 tuition at the school.

23 THE COURT: So there's no cap on anything that the
24 city pays?

25 MR. GRAY: Not that I'm aware of. I mean, you

1 know, not that this is directly relevant to this case, but I
2 know this is a very high tuition, but there are schools out
3 there for special needs kids that have even much higher
4 tuition than this. My understanding is that unless the case
5 settles or there's some negotiation between the school, the
6 parent and the city, the full tuition is paid.

7 THE COURT: Have you had any settlement
8 discussions with regard to this case?

9 MR. GRAY: No, your Honor. I'd be happy to engage
10 in them.

11 THE COURT: These cases are sometimes settled.
12 And what basis are they settled on? Because if the city
13 paid the full tuition, that's not exactly a settlement.

14 MR. GRAY: That's right.

15 THE COURT: Are they settled in some different
16 way?

17 MR. GRAY: In my experience, and the agency's
18 counsel might have more experience than me in this,
19 generally they are settled prior to a hearing or prior to an
20 administrative appeal or sometimes at district court. And
21 usually it's a rather straight forward, look, we think our
22 chances of winning are 80 percent versus 20 percent so will
23 you compromise on the tuition.

24 THE COURT: I see.

25 MR. GRAY: From our organization, our organization

1 is a legal services organization partnership so our parents
2 don't have money to pay the tuition so they have to rely on
3 reimbursement or direct payment, which is what we're asking
4 for in this case.

5 THE COURT: I see. The child attended this school
6 for the full fourth grade?

7 MR. GRAY: That's right.

8 THE COURT: The tuition has not been paid.

9 MR. GRAY: The tuition has not been paid, that's
10 right. So obviously some schools are more lenient than
11 other schools.

12 THE COURT: Again, this is just a background
13 question, it's not at all relevant to the issues in the
14 case, but are the large percentage of tuitions at schools
15 such as this paid by the city or do you know that?

16 MR. GRAY: I wouldn't know that. I mean, I --
17 my -- this is just from what I glean is that the school, you
18 know, Mary McDowell, certain schools have larger percentage
19 of kids who get funding from the city, and certain schools
20 have a larger percentage of kids who get funding from their
21 parents or from a relative or some private source. My
22 understanding, which may be wrong, is that Mary McDowell
23 doesn't have too many cases such as this one.

24 THE COURT: Now, this Mary McDowell is in Staten
25 Island?

1 MR. GRAY: No. It's on Bergen Street.

2 THE COURT: No. There's one on Sidney Place.

3 MR. GRAY: I think it's expanded. Maybe this is
4 the one on Sidney.

5 THE COURT: I thought I saw something about Staten
6 Island which I didn't understand.

7 MR. GRAY: The parent lives in Staten Island.

8 THE COURT: Maybe it was a typo. I wondered about
9 that because the school, as I understand it, is on Sidney
10 Place or at least one of them.

11 MR. GRAY: I think maybe you're right. There is a
12 branch on Sidney. I know there's a branch on Bergen. I
13 think there's another branch down in Red Hook.

14 THE COURT: And the PSA that we're talking about
15 is the PSA in this neighborhood?

16 MR. GRAY: No. That's the PSA in Staten Island.
17 So the parent was living at the time in Staten Island.

18 THE COURT: Oh, okay. That's a separate PSA than
19 Staten Island?

20 MR. GRAY: That's right.

21 THE COURT: So your basic contention is that
22 there's just no support for this conclusion in the IEP that
23 this is an appropriate class size.

24 MR. GRAY: That the DOE didn't present any
25 evidence to support its recommendation, and the burden is

1 clear under New York law that they have to present, you
2 know, evidence both to produce evidence and present
3 persuasive evidence to a fact-finder. And that just did not
4 happen in this case.

5 The secondary argument is that the issue when it
6 comes to placement school, which is the PSA in Staten
7 Island, which I guess is the one that hasn't been in the
8 news recently, but the PSA in Staten Island, the school has
9 to be able to implement the IEP as written. At the hearing,
10 the DOE -- you know, the mom visits the school and says,
11 look, the school appears to be too crowded or something to
12 that effect and would not be appropriate for my child who,
13 you know, needs a calm environment with minimal
14 distractions.

15 At that impartial hearing, the DOE teacher, the
16 teacher from PSA, testifies, yeah, we couldn't implement the
17 certain aspects of this IEP.

18 THE COURT: The testing?

19 MR. GRAY: The testing, that's right. And if the
20 child had attended the school, the IEP would have had to
21 have been changed. So that's the secondary argument.
22 Although I don't think the Court needs to reach that if the
23 Court finds in our favor on the first argument.

24 THE COURT: Thank you.

25 MR. GRAY: Thank you.

1 THE COURT: All right. Does the city want to be
2 heard?

3 MS. MBAYE: Thank you, your Honor. Good
4 afternoon.

5 THE COURT: How are you?

6 MS. MBAYE: Well, thank you. How are you?

7 THE COURT: Fine.

8 MS. MBAYE: I think I'd like to start by
9 responding to counsel's responses to your questions I think
10 as a place to begin addressing the defendant's position that
11 we did, in fact, offer this student a free, appropriate
12 public education.

13 THE COURT: It all boils down to the issue of
14 class size. That's essentially all that we're talking about
15 here. No one is arguing about any other statements in the
16 IEP such as the child's developmental levels or other needs.
17 We're talking about class size.

18 What information supports the class size
19 determination in the IEP?

20 MS. MBAYE: What supports that information is the
21 information that the CSE had at the time of its meeting.

22 THE COURT: What was that?

23 MS. MBAYE: Statements by the student's private
24 schoolteacher that he was making slow but gradual progress
25 in an 11-student classroom at the private school.

1 THE COURT: But there was also testimony that, as
2 I understand it, that that wasn't working, that it was
3 thought that he needed more attention.

4 MS. MBAYE: That testimony came after the CSE
5 meeting. As such, it's impermissible under the Second
6 Circuit's decision in *R.E.* to use that to evaluate the
7 appropriateness of an IEP that was developed months earlier,
8 months before the CSE heard that testimony or had that
9 information.

10 Simply put, what the Court --

11 THE COURT: But I thought there was a teacher at
12 the CSE meeting who apparently has only -- her views have
13 only been recited by other people, but I thought that it was
14 that individual's view that the class size had to be
15 smaller, that he was struggling in this class size?

16 MS. MBAYE: Your Honor, I can --

17 THE COURT: I mean, nothing in the IEP itself
18 supports the determination. It just says -- it notes that
19 the mother thinks that he needs a smaller class. Then it
20 talks about all of these other horrors that nobody else
21 was even proposing, like putting the child in a 30-person
22 class. That won't work, but this seems good, without really
23 addressing the issue of the position as I understood it by
24 both the mother and the teacher that he needs to be in an
25 even smaller class size.

1 MS. MBAYE: Your Honor, what's reflected in the
2 IEP is they felt he needed a great deal of one-to-one
3 attention and support. That doesn't necessarily translate
4 to a smaller classroom, per se. The DOE classrooms that are
5 available that we offer for children with disabilities,
6 there's a 12:1:1 class size, there's an 8:1:1 class size and
7 then a smaller 6 to 1 to 1. Under the state regulations,
8 those class sizes are envisioned for students with
9 increasingly intensive need for educational intervention as
10 the class size gets smaller. That's how the regulatory
11 structure sets these classrooms up. In *J.R.*, we find a
12 student who, while academically he needed a great deal of 1
13 on 1 attention for specific academic needs and where his
14 learning disabilities lay, he demonstrated really terrific
15 social skills. He was -- his teachers noted and informed
16 the CSE team that he was well liked by his peers. That his
17 peers sought to work with him.

18 And I think most importantly, your Honor, is that
19 he was able to advocate for himself and ask for teacher's
20 help when he needed it. And this is something that they
21 were reporting on his ability to do within an 11-student
22 classroom.

23 THE COURT: Didn't the teacher there talk about
24 his needing a smaller setting to thrive in and how he was
25 struggling in the 11-person class with the 2?

1 MS. MBAYE: Your Honor, to struggle in a class
2 does not mean that a class of that same or equivalent size
3 is therefore inappropriate. The IDEA requires the
4 Department of Education to offer an education program that
5 will enable the child to make some educational progress, to
6 make meaningful educational progress. If that progress
7 comes at the cost of a struggle, that doesn't make it
8 inappropriate. It doesn't make it a denial of fate.

9 What we see in *J.R.* is a student with a
10 constellation of academic needs and social skills that made
11 a 12:1:1 classroom with the intense individual related
12 services that the DOE recommended to go along with that
13 program that he could have achieved an educational benefit.
14 And the benefit of being in a larger classroom which is more
15 similar to a typical general education classroom also serves
16 a benefit to him by it's always the Department of
17 Education's goals to place students with disabilities in
18 classrooms that mirror general education -- I don't want to
19 say "mirror," but classes that are as typical an educational
20 experience as possible. And a classroom with 12 students
21 with intense need for -- or with some need for educational
22 intervention is more typical and in more, the DOE believes,
23 beneficial than an even smaller classroom with students
24 whose needs and needs for intervention are even more
25 intense.

1 THE COURT: Well, you're saying all of this. None
2 of this is explained in the IEP. It doesn't really come up
3 with how they get to the bottom line.

4 MS. MBAYE: Your Honor, I don't think that the IEP
5 is required to set forth the full thought process behind the
6 recommendations that it contains. What the IEP is required
7 to contain is an accurate description of the child's social
8 and academic needs and deficits. There's no dispute that
9 the IEP does that. The plaintiffs have conceded at hearing
10 and in their papers that the IEP accurately and
11 appropriately described the student's functional level.
12 That it accurately and appropriately describes his
13 management needs and specific teaching techniques that are
14 effective with him. These issues are not disputed.

15 And similarly, the goals and the annual goals that
16 are set forth in here speak directly to the needs that
17 J.R.'s mother and J.R.'s teacher from the private school
18 informed the CSE meeting about. There is a description in
19 the transcript at page -- I'm sorry. Can I go back and
20 retrieve my notes on that?

21 THE COURT: Sure, sure.

22 MS. MBAYE: Thank you. Yes. So the transcript at
23 page 17, your Honor, Ms. Piccola, who was the DOE
24 representative at the CSE meeting, describes how those
25 annual goals were developed. And they were developed with

1 the explicit intention of making sure that the parents
2 understood the goals that the CSE team was proposing, could
3 respond to those suggestions, could add to them, could say,
4 no, that's not really what he needs, something else.

5 Ms. Piccola describes how they put the present level of
6 performance on the SMART Board enlarging it so that the
7 parent could really see what they were talking about and
8 develop those goals.

9 That's exactly what the IDEA is intended to
10 foster; that type of collaborative experience between the
11 district, the Department of Education personnel and the
12 child's parents to develop a program that's appropriate and
13 individualized towards his needs. And that's what you see
14 in the IEP. The goals that are contained within the IEP are
15 targeted expressly towards his areas of greatest deficit
16 which are language expression, language comprehension,
17 reading comprehension, decoding words, encoding words.
18 These are all outlined with specificity. That's what an IEP
19 is required to contain under the law.

20 THE COURT: Yes, but it doesn't explain how all
21 those other services deal with what -- and I'm reading now
22 from the original hearing officer's opinions. The student's
23 teacher and parents have found that the student would
24 probably be very frustrated if he were to attend a class
25 with students -- he's talking about behavioral issues. I

1 guess that's talking about the PSA issue, but the teacher
2 testified that for the first two years the student attended
3 a classroom of 10 and 11 students and could not keep up with
4 the class. His self-esteem suffered and he was unable to
5 perform. His behavior deteriorated. He'd be frustrated and
6 overwhelmed in a larger class because of his receptive and
7 expressive language and auditory processing deficiencies.
8 The parent testified the student attended a class of 12
9 recently and had great difficulty. His academics and
10 behavior improved with his current class of seven.

11 I mean, the fact that you may have other services,
12 it doesn't seem to me, meets the class size issue.

13 MS. MBAYE: Your Honor, a couple of things to
14 unpack the impartial hearing officer's decision that you
15 just read. The findings that the impartial hearing officer
16 made about students with behavioral issues in the classroom
17 was improper because -- for two reasons. First --

18 THE COURT: Well, forget that. You're talking
19 about the PSA kids who were acting up. I agree that that's
20 probably not an issue. Who knows what kids can be in what
21 class at any given time. I don't give much weight to that.

22 MS. MBAYE: As to class size, I understand that's
23 your Honor's primary concern. The information in the
24 testimony that the mother offered about the child's success
25 in the seven-student classroom, again, came long after this

1 IEP was developed. At the time the IEP was developed, the
2 student was in a 10- or 11-person classroom at Mary McDowell
3 and was struggling but making slow and gradual progress.

4 THE COURT: But that was a class with two
5 teachers. Even that was a class with 10 and two teachers,
6 not a class with 12 and a teacher and a paraprofessional,
7 right. So even the class in the IEP doesn't even reach the
8 level of the one in which he was struggling, right?

9 MS. MBAYE: Your Honor, we think that the
10 distinction between two teachers in a classroom and a
11 teacher and a paraprofessional is not material. That small
12 difference doesn't make the difference between offering a
13 FAPE and not offering a FAPE.

14 When you look at the transcript on page 20, a
15 witness from the Department of Education describes what a
16 typical 12:1:1 DOE classroom looks like and how it's
17 operated. And what she describes is a class where the
18 teacher very clearly lays out expectations for the day and
19 discusses what's going to happen next and how it will
20 happen.

21 Now, this aligns with the plaintiff's description
22 of what happened at the Mary McDowell school; that there was
23 a great deal of teacher repetition. Similarly, that's what
24 typically goes on in a DOE 12:1:1 class. These are good
25 principles of teaching students with disabilities.

1 The testimony continues where the witness,
2 Ms. Piccola, describes -- and that's P-i-c-c-o-l-a --
3 describes that a teacher would lead a reading, for example,
4 and then the class would break down into smaller groups.
5 And those groups would be based on the student's functioning
6 levels.

7 And sometimes students would be placed with
8 stronger students or weaker students to draw on that
9 student's strengths to either let them lead the way a little
10 bit or have somebody pull them up a little bit. These are
11 techniques that could be implemented by a teacher and the
12 teacher's paraprofessional and could be implemented by two
13 teachers as well.

14 So the difference between 11 students and two
15 teachers and 12 students, a teacher and a paraprofessional
16 we submit, your Honor, that that's not the difference
17 between an appropriate education and an inappropriate one.
18 That the 12:1:1 classroom is designed for students like J.R.
19 who have these needs for repetition, for small group work.
20 His recommendation for individualized speech language
21 therapy and individualized occupational therapy and group
22 counseling to work on his frustration and behavior issues,
23 these were all intended and tailored specifically for him to
24 help him make some progress, just as he had been making
25 progress in his private school classroom.

1 And this program here, the DOE feels and the SRO
2 found and is supported by the law, that this is exactly the
3 kind of classroom that is intended for this kind of student
4 and was customized appropriately for him and his particular
5 needs and would have provided him with an opportunity for
6 meaningful educational progress.

7 THE COURT: Part of the basis for the IEP that was
8 developed was a report from the Mary McDowell school. Where
9 is that report? It's not in the record.

10 MS. MBAYE: No, it is not in the record, your
11 Honor.

12 THE COURT: Shouldn't that be in the record?

13 MS. MBAYE: If I had my druthers defending this
14 case, your Honor, yes, it should be in the record. However,
15 what is in the record is the parents --

16 THE COURT: Why isn't it in the record?

17 MS. MBAYE: I cannot answer that question. I did
18 not handle the impartial hearing. I do not know why that
19 was not introduced into evidence.

20 THE COURT: Well, whose burden is it to provide a
21 full picture to the hearing? I mean, that document could
22 cut for or against you. But it seems like a significant
23 piece of the record that's missing.

24 Who bears the responsibility for that?

25 MS. MBAYE: Your Honor, all the parties at the

1 impartial hearing can introduce evidence in support of their
2 case. Just because the document isn't in the record doesn't
3 mean that there's no evidence of it. There's testimony
4 about what was in that report. There's testimony that --

5 THE COURT: And what is the testimony about what
6 was in that report?

7 MS. MBAYE: The testimony is from -- is what's
8 recounted by -- I don't have an exact cite for you right
9 now, your Honor, but I would be happy to find that when I
10 sit down and come back to you with that.

11 THE COURT: Okay.

12 MS. MBAYE: The question of the appropriateness of
13 evaluative materials is often raised in these IDEA cases.
14 Here plaintiff never raised that issue until federal court
15 so as an initial matter, they have waived it. That's the
16 case of the Second Circuit decision in *C.F.* So to discuss
17 the appropriateness of that piece of evaluative material,
18 plaintiffs may not raise it this late in the game.

19 But in the case law when you look at where courts
20 have found evaluative material to be insufficient or
21 insufficient to support an appropriate program
22 recommendation, is when you find that the evaluative
23 materials relied on are out of date, grossly out of date,
24 three years overdue, three years old, four years old.

25 What the testimony reflects and what the IEP

1 reflects and what the parents' testimony adopting what's in
2 the IEP reflects is that those materials -- that Mary
3 McDowell school report was adequate. It was recent.
4 There's no suggestion --

5 THE COURT: Nobody knows what it says, right?

6 MS. MBAYE: But what it's used for, what the
7 evaluations are used for, and the input of the mother and
8 the input of the private schoolteacher, what that is used
9 for is to develop the present levels of performance that are
10 in the IEP. And those levels of performance and those
11 levels of -- those expressions of academic management needs
12 are in the IEP and the parents and the plaintiffs have
13 conceded that they're accurate.

14 So it's really a red herring to ask this Court now
15 to focus on whether or not the right -- a certain piece of
16 paper was put in evidence when the plaintiffs have already
17 waived the issue by never raising it before, and they have
18 conceded that whatever information was gleaned from that
19 piece of paper is accurate and is good.

20 THE COURT: You know, I'm not sure what was
21 gleaned from the piece of paper because I don't know what
22 was in it. I mean, it could have had testing results,
23 obviously. I don't know whether it expressed any view about
24 class size or any of the views about struggling in class or
25 any of that.

1 MS. MBAYE: Well, class size recommendation is a
2 recommendation; that's not an evaluative metric.

3 THE COURT: Well, was there a recommendation from
4 the school or his teachers in the school about class size
5 before the IEP was formulated?

6 MS. MBAYE: Your Honor, it doesn't matter because
7 just because a private school or a parent says I think this
8 certain class size is right for my child, does not mean that
9 the Department of Education is obligated to adopt that.

10 THE COURT: Well, I know it doesn't, but if the
11 school has a view based on their history with the child, it
12 should be at least considered in the formation of the IEP
13 and there should be an explanation about why it was
14 rejected.

15 And I take it that the school did have some or
16 took some position through this person that everybody keeps
17 repeating what she said as to why -- or a recommendation
18 that wasn't consistent with what was ultimately found in the
19 IEP, correct?

20 MS. MBAYE: I hesitate to agree completely with
21 that, your Honor, because what we know was that, and as your
22 Honor has said, what the person from the private school told
23 the CSE team -- and, again, she didn't testify at the
24 hearing so we are going --

25 THE COURT: Someone from the school did testify at

1 the hearing. Your position as to that testimony is because
2 they are testifying about things that happened later, that
3 the testimony can't be considered?

4 MS. MBAYE: It's impermissible retrospective
5 testimony.

6 THE COURT: Well, what is the impermissible
7 retrospective testimony that you're speaking to?

8 MS. MBAYE: I'm speaking of the testimony that
9 when the student was in a seven-student class in the
10 Whittier room, as plaintiff's counsel described, that he did
11 better than he had done the year before in an 11-student
12 class. And that's impermissible because the student wasn't
13 even enrolled in that seven-person class until months after
14 the CSE meeting.

15 What the Second Circuit says in *R.E.* and in case
16 after case, that the IEP is a snapshot in time, and you have
17 to evaluate the recommendations contained therein and the
18 soundness of those recommendations based on the information
19 that the people who developed that IEP had at the time that
20 they developed it. And in -- I'm sorry. I'm just going to
21 get the date here.

22 The date of this IEP was May 2013 -- May 2012.
23 The student wasn't enrolled in a seven-person class. The
24 IEP team had no knowledge whatsoever that he would be
25 enrolled in a seven-person class, let alone how he would

1 fair in that classroom.

2 So it's simply unfair to evaluate the
3 recommendation based on information that they did not have.

4 THE COURT: Well, why doesn't that information
5 just shed late or corroborate the earlier opinions that were
6 expressed to the CSE by both the school and the parent that
7 this class size is too big, that he's struggling and that
8 this bears that out, in other words, it corroborates what
9 they said? I know that the CSE doesn't have that specific
10 information at the time, but you've got people saying that.

11 MS. MBAYE: Your Honor, the Second Circuit has
12 very clearly forbidden courts from considering that when
13 evaluating the appropriateness of a CSE team's
14 recommendation. The information gathered after the fact is
15 not fair game.

16 THE COURT: Okay. Let me just ask, Mr. Gray, do
17 you have anything -- thank you.

18 MS. MBAYE: You're welcome. Thank you, your
19 Honor.

20 MR. GRAY: I have nothing further, your Honor. If
21 you have a question --

22 THE COURT: What about counsel's point about we
23 can't consider the testimony given at the hearing by the
24 teacher who says, listen, he's been in this class for 4th
25 grade and he's doing great, and the seven-person class is

1 working for him and all of that?

2 Do you agree that the Circuit says that you can't
3 consider that information?

4 MR. GRAY: No, I don't agree. You know, the SRO's
5 position on the specific issue actually in the decision is
6 one of the irregularities or one of the problems that I
7 point out in the brief. Look, this testimony happened at
8 the hearing. We don't know that the CSE knew that the child
9 was struggling in 11-student classes.

10 It's very clear from the record, obviously, the
11 mom was at the CSE meeting, the teacher from Mary McDowell
12 was at the CSE meeting, it's very clear that the CSE
13 participants knew the class size that he was in.

14 THE COURT: All right. So what about -- the
15 testimony at the hearing, I take it, talks about what
16 he -- testimony in part talks about what's going on now in
17 the 4th grade and we're doing great and, you know, there's
18 seven children in the class. Can that -- what counsel is
19 saying is that information can't be considered in going back
20 in time to determine whether the IEP was properly
21 formulated.

22 Do you agree with that as a legal matter?

23 MR. GRAY: Yeah. I guess I would say if that was
24 the only testimony or if that was the only evidence that,
25 you know, the child needed a smaller classroom and it

1 occurred and the CSE did know about it and it occurred nine
2 months after the CSE meeting, that would be retrospective, I
3 would agree. Just like the DOE can't, you know, submit
4 additional evidence rehabilitating the ineffective IEP at a
5 hearing nine months later.

6 But the fact of the matter is that in this case
7 that everybody at the CSE meeting, I think the record is
8 clear, knew that the child was struggling in a class of 11.

9 THE COURT: But you agree that it's frozen in time
10 in terms of the point that one evaluates what the CSE knew
11 at the time that they formulated the IEP?

12 MR. GRAY: You know, I guess that sounds a little
13 bit black letter to me, but perhaps that's correct. You
14 know, I think that the retrospective issue is irrelevant to
15 this case.

16 THE COURT: Let me just ask you -- obviously, I'm
17 not going to discuss this with you in any depth because I
18 have to rule on the cross-motions here, but do you think
19 that there's any benefit in this case with you all
20 discussing a settlement short of resolving the issues in
21 your summary judgment motion or not?

22 MS. MBAYE: I'd like to have a moment to confer
23 with my client about that but, as Mr. Gray pointed out,
24 these cases have been known to settle at every stage in the
25 game. So I would not foreclose anything. However, I would

1 like to --

2 THE COURT: Why don't you talk a moment and let's
3 just see whether -- and I was just -- is there a magistrate
4 judge on this case?

5 MS. MBAYE: I believe Magistrate Reyes.

6 THE COURT: If you all think it's worthwhile, I
7 would like for you to discuss that issue with him, if you
8 think it's worthwhile pursuing, before I resolve this. If
9 you don't, then fine. I'm not going to suggest the parties
10 have to do that. But why don't you just find out first.

11 You want to talk to your client?

12 MS. MBAYE: Yes, please, your Honor.

13 THE COURT: Okay.

14 (Brief pause.)

15 MS. MBAYE: Your Honor, given the bureaucracy
16 issues -- there are still a few other people who aren't
17 present today that we'd like to talk about it with -- could
18 we submit a letter to the Court in a few days?

19 THE COURT: Fine. Just indicating whether you are
20 conducive to discussing it.

21 Let me just ask a quick question on the other
22 prongs to test whether the Mary McDowell placement would be
23 appropriate. Do you challenge that, that Mary McDowell,
24 assuming this wasn't appropriate, that Mary McDowell was
25 appropriate? Or was this a balance of equities? Where do

1 you stand on those two prongs?

2 MS. MBAYE: As to prong two whether or not the
3 Mary McDowell school is appropriate, we don't think that
4 there's evidence that it is. The fact that the child had to
5 be counseled out of their main classroom, brought into this
6 smaller classroom, that his behavioral issues are being
7 helped not by the in-school programming, but really only by
8 virtue of his outside therapist and outside medication, that
9 they haven't shown that he's making educational progress
10 there. And so we are --

11 THE COURT: Now, at what period of time do you
12 look at that issue? Because there was testimony -- I mean,
13 I can consider the testimony on that prong about the
14 seven-person class and all of that, correct?

15 MS. MBAYE: Yes, you can, your Honor.

16 THE COURT: And doesn't that seem to have been
17 working well or he was doing much better?

18 MS. MBAYE: We think that while doing better, and
19 this is not an argument that we addressed in our papers --

20 THE COURT: This is not an argument you're really
21 serious about, you just have to make it, right?

22 MS. MBAYE: We don't make the equities argument at
23 all, your Honor. We put no eggs in that basket.

24 THE COURT: You're only putting, like, 1 out of 12
25 eggs in the Mary McDowell's not the appropriate school.

1 MS. MBAYE: Precisely.

2 THE COURT: Okay. I got it. Thank you very much.

3 (Time noted: 3:55 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter.


Official Court Reporter